(25)

F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No. 633 of 2006

Bihari Lal Patle

Vs.

State of Chhattisgarh

Post for Judgment: 08.11.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

Criminal Appeal No.633/2006

Bihari Lal Patle

Vs.

State of Chhattisgarh

Shri Gautam Khetrapal, learned Counsel for the appellant.
Shri M.P.S. Bhatia, Panel Lawyer for the State.

J U D G M E N T

(Delivered on this 08th day of November 2006)

This appeal is directed against the judgment dated 14th August 2006 delivered by Shri N.K.Chandravanshi, 4th Additional Sessions Judge, Bilaspur in Sessions Case No. 108 of 2006 whereby the appellant was convicted under Section 450 and 376 (1) of the I.P.C. and sentenced to undergo rigorous imprisonment for 5 years and a fine of Rs.5000/- and in default to undergo further rigorous imprisonment for six months under Section 450 I.P.C. and to undergo rigorous imprisonment for 10 years and a fine of Rs.10,000/- and in default to undergo rigorous imprisonment for one year under Section 376 (1) I.P.C.

2. Shri Gautam Khetrapal, learned counsel for the appellant has, at the very outset, stated that in this appeal he does not dispute the fact that the prosecutrix was aged 12 years on the date of occurrence and that the appellant is the cousin brother of the prosecutrix.

3. Briefly stated the prosecution story is that on 26th November 2005 the parents of the prosecutrix had gone for work. The prosecutrix, aged 12 years, was in the house with her younger brother Tikaram, aged one and half years and sister Manisha, aged two years. At about 12.30 P.M the appellant forcibly entered the house of the prosecutrix and laid the prosecutrix on the cot and after removing her underwear committed rape on her. Hearing the cries of the prosecutrix, uncle Teejlal P.W.3 and Rajkumari P.W.2 arrived. The appellant hid under the *Goda* i.e. the place for keeping haystack in the house. Mother of the prosecutrix, Rajkumari P.W.2, locked the *Goda* where the appellant hid, from outside. The prosecutrix who was bleeding profusely from her private part narrated the incident to Rajkumari P.W.2 and uncle Teejlal P.W.3. .

4. On the same day i.e. 26.11.2005, Teejlal P.W.3 took the prosecutrix to P.S. Kota situated 9 kilometers away from the place of occurrence where the prosecutrix lodged F.I.R. vide Ex.P.1 at 4.30 P.M. On medical examination by Dr. Nikita Kanwar P.W.17 on the same day at about 6.00 P.M., it was found that the prosecutrix was bleeding due to injury to her private part. There was tear of vagina, hymen was absent, vagina was red and swollen and painful on touch and was bleeding from the tear. The size of the vaginal tear was 1.5 cm x .5 cm. The injury on the private part of the prosecutrix was very tender. She was not cooperating for detailed examination. Dr. Nikita Kanwar P.W.17 opined that the findings recorded by her were suggestive of rape. She prepared vaginal slide of the prosecutrix and advised chemical examination by F.S.L. Vaginal slide was sealed and handed over to Constable of P.S. Kota.

5. On 27.11.2005 Dr. Sunita Verma P.W.14, Head Gynecologist and Obstetrician at the Chhattisgarh Institute of Medical Sciences (C.I.M.S.) examined the prosecutrix under general anesthesia at 2.00 P.M. and confirmed the findings recorded by Dr. Nikita Kanwar. On examination, she found a central perineal tear sized 1" with another central vertical tear in the vagina sized 2" which was bleeding. The wound was repaired and the prosecutrix was admitted in the C.I.M.S. She opined that the injury sustained by the prosecutrix could have been caused by hard and blunt object within 24 hours prior to the examination. The appellant was also medically examined by Dr. Sandeep Dwivedi P.W.6 on 27.11.2005. It was opined that the appellant was capable of performing sexual intercourse. The underwear of the accused which had blood and semen like stains, the semen ejaculated by the appellant and pubic hair were sealed by Dr. Sandeep Dwivedi and handed over to the Police Constable of P.S. Kota which were seized vide Ex.P.15. The underwear of the prosecutrix and her vaginal slide were also seized vide Ex.P.16. The birth register of the Tribal Welfare Department of Government of Madhya Pradesh wherein date of birth of the prosecutrix was entered as 04.11.1993, was also seized vide Ex.P.11.

6. The prosecutrix was admitted on 27.11.2005 in the C.I.M.S. and was discharged on 30.11.2005. During investigation, spot map was prepared by Ramnath Rathore P.W.8 vide Ex.P.7. On 27.11.2005 from inside the house of the prosecutrix, a cloth stained with semen and blood which was lying on the cot was seized. The *Newar* of the cot which also had bloodlike stains was seized vide Ex.P.4. The articles mentioned above along with the underwear, pubic hear and seminal

slide of the appellant and the underwear and vaginal slide of the prosecutrix were sent for chemical analysis to the F.S.L. on 31.12.2005. Vide report Ex.P.24 excepting the pubic hair and seminal slide of the appellant, blood was found on all other articles. Similarly, excepting the pubic hair of the appellant, presence of semen and human spermatozoa was confirmed on all other articles. After completion of investigation, the appellant was prosecuted.

7. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 17 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in paragraph 1 (supra).

8. Shri Gautam Khetrapal, learned counsel for the appellant contended that there is not even an iota of legal material to sustain the conviction of the appellant under Sections 450 and 376 (1) of the I.P.C. since the prosecutrix P.W.1 and her mother Rajkumari P.W.2 had turned hostile and did not support the prosecution story. It was also contended that Dr. Nikita Kanwar had admitted in cross-examination that while taking a swing if the prosecutrix had fallen on a wooden stump which penetrated her private part, the injury sustained by the prosecutrix could have been caused. It was urged that in paragraph 5 of her testimony, Dr. Nikita Kanwar P.W.17 had stated that no definite opinion about rape having been committed on the prosecutrix could be given. It was also argued that Teejlal P.W.3 also did not support the prosecution story and stated that since the appellant was present at the house near the cot on which the prosecutrix was crying he had taken the prosecutrix to the P.S. Kota to lodge a report

against the appellant on mere suspicion. Lastly, it was contended that the appellant was innocent and had been falsely implicated on mere suspicion and the prosecutrix had sustained the injury on her private part upon a fall on a wooden stump from a swing which had penetrated her private part.

9. On the other hand, Shri M.P.S.Bhatia, learned Panel Lawyer argued in support of the impugned judgment and contended that the report of the F.S.L. confirming the presence of semen and human spermatozoa not only on the vaginal slides of the prosecutrix but also on her underwear as also on the underwear of the appellant and the cloth and *Newar* seized from the place of occurrence clearly established rape by the appellant on the prosecutrix. It was also urged that the fact that upon arrival of Rajkumari P.W.2 and Teejlal P.W.3 the appellant hid himself inside the house which was locked by the mother of the prosecutrix from outside also corroborated the testimony of the prosecutrix upon leadings questions *in toto.* It was urged that the prosecutrix being a child of tender years was under the influence of her parents while deposing in the examination-in-chief but had narrated truly upon leading questions being asked by the prosecutor that the appellant had committed rape on her. On these premises, it was urged that the conviction of the appellant under Section 450 and 376 (1) of the I.P.C. and the sentence awarded thereunder by the learned trial Judge was well merited and did not call for any interference.

10. Having heard rival submissions, I have perused the record of Sessions Trial No.108 of 2006. The testimony of Rajkumari P.W.2 that on returning home with Teejlal P.W.3, the prosecutrix told her

that due to the swing breaking down she had a fall on a stump which had injured her private part is nothing but a bundle of falsehood. She admitted in cross-examination in paragraph 7 that the father of the accused and her husband were cousin brothers and that a compromise had taken place between them. She also admitted in cross-examination that upon returning home from the field she saw the prosecutrix crying inside the house and blood oozing from her private part. She further admitted that after bringing the prosecutrix and other minor children outside, she had locked the room since the appellant had hidden himself under the place for keeping haystack i.e. *Goda*.

11. Teejlal P.W.3 has deposed that on returning home with Rajkumari P.W.2, he found that the prosecutrix was crying while lying on the cot and was bleeding from her private part. The appellant was standing nearby. The underwear and *chunni* of the prosecutrix had blood like stains. Therefore, he immediately took the prosecutrix to lodge a report of rape by the appellant. It is to be noted that nowhere in his entire testimony, he has deposed that the prosecutrix had narrated that she had a fall from the swing upon a stump which had injured her private part. In paragraph 5 of his testimony, he has admitted that the cot on which the prosecutrix was lying had bloodlike stains on the *Newar* which along with the bloodstained *Chaddi* of the prosecutrix was seized by the Police. The above testimony has remained wholly unrebutted in cross-examination. If the prosecutrix had narrated to Teejlal that she had a fall on a stump while taking a swing, Teejlal P.W.3 would not have taken her to the Police Station to lodge a report of rape against the cousin brother of the prosecutrix i.e. the present appellant. The above facts explain

the testimony of the prosecutrix in her examination-in-chief that on being pressurized by her parents to depose a concocted story, she being of a very tender age, had stated likewise in her examination-in-chief but on leading questions being asked by the prosecutor admitted that the appellant had entered the house while she was with her minor younger brother and sister and after pushing her on the cot and removing her clothes and undressing himself, the appellant had forcibly penetrated his penis inside her vagina due to which she experienced pain and blood started oozing. She also admitted that on hearing her shouts upon arrival of her mother, the appellant hid in the *Goda* and seeing this, her mother took her and her minor brother and sister out of the house and locked the door of *Goda*. There is not even an iota of doubt that upon a compromise by her parents the prosecutrix had deposed falsely in her examination-in-chief and cross-examination.

12. Bearing the natural human conduct in mind, it is clear that had the prosecutrix sustained the injury upon a fall from the swing, under no circumstances Teejlal P.W.3 would have taken the prosecutrix to the Police Station to lodge a report of rape having been committed on her by her cousin brother i.e. the appellant. Had the prosecutrix fallen from the swing, she would have sustained some external injury on her body which she did not. Had it been so, the mother of the prosecutrix, on hearing the story narrated by the crying prosecutrix, would not have locked the appellant inside the *Goda*..

13. The testimony of the prosecutrix, upon leading questions being asked by the prosecutor, inspires confidence and is wholly reliable since it is fully corroborated by Dr. Nikita Kanwar P.W.17 who had

found that the prosecutrix was bleeding due to injury from her private part. There was tear of vagina, hymen was absent, vagina was red and swollen and painful on touch and was bleeding from the tear. The size of the vaginal tear was 1.5 cm x .5 cm. The injury on the private part of the prosecutrix was very tender. She was not cooperating for detailed examination. Dr. Nikita Kanwar P.W.17 opined that the findings recorded by her were suggestive of rape. She prepared vaginal slide of the prosecutrix and advised chemical examination by F.S.L. Vaginal slide prepared was sealed and handed over to Constable of P.S. Kota. The above evidence finds further corroboration from the testimony of Dr. Sunita Verma P.W.14 who examined the prosecutrix under general anesthesia and found a central perineal tear sized 1" with another central vertical tear in the vagina sized 2" which was bleeding. Sub-Inspector A.S. Paikra P.W.16 has proved the F.I.R. lodged by the prosecutrix on 26.11.2005 vide Ex.P.1 while she was accompanied by Teejlal P.W.3 to the Police Station Kota. He has also proved the seizure of a white coloured cloth lying on the cot and having blood and semen like stains and the underwear of the cot having bloodlike stains and the seizure of the underwear and pubic hair of the accused-appellant and also the seizure of underwear of the prosecutrix and the vaginal slides prepared by Dr. Nikita Kanwar vide Exs.P.15 and 16 respectively. He has also proved that the aforesaid articles which were sent for chemical analysis, were received in the F.S.L. Raipur vide acknowledgment Ex.P.23. The report of the F.S.L. Ex.P.24 also establishes that the piece of cloth found on the cot, the piece of *Newar*, the underwear of the accused, the underwear and the vaginal slides of the prosecutrix had contained blood. It also establishes that the presence of semen and human spermatozoa was confirmed on the

piece of cloth, piece of *Newar*, underwear of the accused, semen of the accused, underwear of the prosecutrix and the vaginal slide of the prosecutrix. The presence of semen and human spermatozoa on the vaginal slide of the prosecutrix and the piece of cloth lying on the cot on which rape was committed by the appellant on the prosecutrix and also on the piece of *Newar* of the cot leaves no room for any doubt in the above mentioned circumstances that the appellant had entered the house of the prosecutrix for committing rape on her and had committed rape on her after pushing her on a cot.

14. No explanation is forthcoming from the appellant as to why he was locked by Rajkumari P.W.2 inside the room where the prosecutrix was crying and why was he found standing near the cot on which the crying prosecutrix was seen lying by Teejlal P.W.3. The above mentioned circumstances read with the prompt F.I.R. Ex.P.1 lodged by the prosecutrix and the findings recorded by Dr. Nikita Kanwar P.W.17 and Dr. Sunita Verma, P.W.14 read with the report of the F.S.L. Ex.P.24 leave no room for any doubt that the appellant had committed rape on the prosecutrix after entering her house and seeing her mother arrive had hid himself inside *Goda.*

15. While assessing the testimony of the prosecutrix, the Court must bear in mind the human psychology and behavioural probability. The injury on the private part of the prosecutrix, the prompt F.I.R. lodged by her at Police Station Kota, presence of blood on the underwear of the prosecutrix and accused and also on the cloth lying on the cot and its *Newar* and the presence of semen and human spermatozoa in the vaginal slide of the prosecutrix leave no room for any doubt that rape has been committed by the appellant on the

prosecutrix. The learned trial Judge rightly took into consideration the above facts and did not sacrifice common sense in favour of an artificial concoction called judicial probability. The probabilities factor does not render the testimony of the prosecutrix unworthy of credence. Although in her examination-in-chief she tried to support the concocted story put forth by her mother in view of the compromise, she narrated the entire incident truthfully upon leading questions being asked and her testimony was corroborated fully not only by medical evidence but also by the report of the F.S.L. The fact that the appellant was seen standing near the cot on which the prosecutrix was crying by Teejlal P.W.3, the fact that the prosecutrix was bleeding from her private part, the fact that a prompt F.I.R. was lodged by the prosecutrix regarding rape by the appellant, the fact that the appellant was locked inside the house by Rajkumari P.W.2, the fact that presence of human blood was confirmed on the underwear of the appellant as also of the prosecutrix and also on the cloth and *Newar* of the cot and the presence of semen and human spermatozoa on the vaginal slide and *Chaddi* of the prosecutrix and also on the cloth and *Newar*, there is a built-in assurance that the charge leveled against the appellant is genuine rather than fabricated.

16. It has been reiterated time and again that merely because a witness has suppressed truth in the examination-in-chief, the entire testimony of such a witness cannot be discarded as unworthy of credence. In such a situation, the Court has to consider the probabilities factor, the social backdrop of the prosecutrix, and the other circumstantial evidence available on record and to sift the grains of truth from the chaff of falsehood. In **Gura Singh v. State of Rajasthan**[1] the Apex Court observed thus:

> "11. There appears to be a misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in *Bhagwan Singh* v. *State of Haryana*[2] held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness. In *Rabindra Kumar Dey* v. *State of Orissa*[3] it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy".

17. In the factual scenario, I refuse to countenance the suggestion made by the defence that the appellant has been falsely roped in on mere suspicion. It appears that the parents of the prosecutrix after having lodged a prompt F.I.R. realized the traumatic effect on the psychology of their daughter and to save their own social status and also their reputation in society chose to compromise with the appellant who was the cousin brother of the prosecutrix and tutored the tender aged prosecutrix to narrate a false story in court. In the above mentioned circumstances, the argument advanced by the learned counsel for the defence that the appellant had been falsely

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1. 2001 CRI.L.J. (SC) 487 2. AIR 1976 SC 202 3. AIR 1977 SC 170

implicated by Teejlal P.W.3 must be unceremoniously thrown over.

16. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the conviction of the appellant under Sections 450 & 376 (1) of the I.P.C. is well merited and call for no interference.

17. The only question that remains to be considered is as regards the sentence. The appellant has behaved in a shockingly indecent manner. The magnitude of the offence cannot be over-emphasized in the context of the fact that he misused his position as a cousin brother and protector of the prosecutrix and took undue advantage of the situation of the prosecutrix being alone by subjecting her to a forcible sexual intercourse. Thus, it is a crime of which a very serious view must be taken. In this view of the matter, the sentence awarded by the learned trial Judge under Sections 450 and 376 (1) of the I.P.C. is wholly commensurate with the magnitude of the offence committed by the appellant and deserves no leniency whatsoever.

18. In the result, I decline to interfere with the well merited conviction and sentence awarded by the learned trial Judge under Sections 450 & 376(1) of the I.P.C. This appeal being devoid of merit is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge